SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

ORMAN W. EWING,

v. *Petitioner,*

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion below, announced December 1, 1942, appears in the record at pages 69 to 82. Rehearing was denied December 11, 1942.

The memorandum opinion of the District Court will be found in the record at pages 29 to 67.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. Also the Act of March 8, 1934, and the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, in pursuance thereof.

Statement of the Case.

A concise statement of the case containing, as the petitioner believes, all that is material to the consideration of the questions presented is set forth in his petition and is not repeated here.

Specification of Errors to Be Urged.

The court erred:

In affirming the judgment of the District Court.

In entering judgment for the United States.

In holding that a trial court can receive in evidence in a criminal trial the opinion of a witness as to the guilt of an accused.

In failing to hold that prejudicial error resulted when improper testimony was offered to the jury.

ARGUMENT.

I.

Opinion Evidence as to the Guilt or Innocence of an Accused Cannot Be Received in a Criminal Trial.

If the opinion of the majority in this case is permitted to stand then there has been approved for the federal courts a rule of evidence that is fraught with the gravest danger. Certainly under such a course of procedure no accused can be accorded the constitutional guaranty of a fair and impartial trial.

In the instant case a witness, Hester Chamberlin, was sworn on behalf of the petitioner. Although nothing was asked on direct examination about a visit to the State of Utah she was asked on cross-examination about such a visit and about a conversation with Mrs. Crandall (mother of

the complaining witness). The district attorney went beyond the scope of the direct examination and asked this:

> Q. Now in that conversation, did Mrs. Crandall ask you if you thought Ewing was guilty and didn't you say Yes?
>
> A. No, she didn't.
>
> (R. 32.)

Therefore it will be seen that as she denied the damaging statement or admission the government was concluded by the answer and could not contradict her. *Attorney General* v. *Hitchcock,* I Exch. 91 (1847). See also Greenleaf on Evidence, Section 461 f (citing *Atty. Gen.* v. *Hitchcock*). Yet notwithstanding the accepted rule the government was permitted to contradict the witness on a collateral matter. The government called Mrs. Crandall (mother of the complaining witness), and she was questioned concerning the interview as follows:

> Q. On that occasion did you look at Miss Chamberlin and point and say this: "Do you believe that Mr. Ewing is guilty of raping my daughter," and did she say, "I do believe it"?
>
> A. Yes she did.
>
> Q. Did she further say on that occasion, "He is facing the electric chair and I have got to be on his side?"
>
> A. Yes.
>
> (R. 32, 33.)

It is difficult to understand how the court below could justify such an invasion of the function of the jury. And we protest with all possible vigor such a departure from the accepted and usual course of judicial proceedings. That it was prejudicial and damaging can admit of no dispute. The district attorney knew that the reception of such evidence would be fatal when it is considered that Miss Chamberin testified that she slept in a room adjoining the room where the offense is alleged to have taken place. There-

fore if the jury believed that she believed the petitioner to be guilty the jury could well infer that she either saw him enter the room occupied by the girl or looked through the keyhole and saw him committing an act of immorality. And it must be remembered that Miss Chamberlin denied that she made the statement attributed to her. Furthermore it must be considered that there was a witness present in the courtroom (and not called for reasons never explained to the petitioner) who was present at the conversation in Utah and would have testified that the statement was not made (Record 89-91).

We are not unmindful of the grave danger confronting an accused charged with such a serious crime and involving a girl young in years. Prejudice is necessarily great and for that reason—if no other—there is a duty on the part of the trial court to protect his rights at all stages. Trial judges too are often carried away with sympathy for the girl. (In this case the girl was 20, the accused past 55.) And that prejudice often carries over and lodges itself in the hearts of the reviewing court. Yet the words of Judge Jones in his dissent in the case of *Johnson* v. *United States*, 129 Federal (2nd) 954 CCA 3 (1942) now before this court on a writ of certiorari have application here. Judge Jones said:

> "It may very well be that the defendant in this case is guilty of the offenses precisely as charged by the government, but the appropriate function of a reviewing court is to determine whether applicable legal standards were fully and fairly complied with at the trial in respect of the defendant's substantial rights. Nor may the notoriety of a particular defendant ever dissuade from a dispassionate inquiry into the merit of his timely complaint. While, quite understandingly, any question as to the fairness of a trial is of immediate and direct concern to the convicted defendant, yet its wider importance lies in its significance to the

public at large. The rights of all are adversely affected when the rights of one are substantially impaired or disregarded. And this is especially true if the impairment or want of regard transpires under legal forms."

In the *Johnson* case a strong reason for seeking certiorari was the action of the trial court in permitting the accused to be questioned on collateral matters and going beyond the scope of the direct examination. And it is most interesting to note that this Court agreed to review this case and it will be reached for argument perhaps by the time this petition is filed.

It is obvious that the Court below had great difficulty in justifying the admission of the objectionable evidence. That will be seen when it is realized that 7 pages of the opinion of the majority are devoted to this point. Then it will be seen that the Chief Justice of the court below correctly stated the law when he stated that the evidence was not admissible. We find this from the Chief Justice:

"I think it was error to have allowed a witness for the government to testify that, in a conversation with one of the defendant's witnesses, the latter had expressed the opinion that the defendant was guilty of the crime for which he was on trial. When Miss Chamberlin, defendant's principal witness, was on cross-examination the District Attorney asked her whether, on a visit to Utah, she had called on the mother of the prosecutrix, and conversed with her. She replied she had. She was then asked:

"Question: Now in that conversation, did Mrs. C— ask you if you thought Ewing was guilty, and didn't you say Yes? Answer: No, she didn't."

At the close of the defendant's evidence Mrs. C— was called and sworn and was asked:

"Question: On that occasion, did you look at Miss Chamberlin and point and say this: 'Do you believe

that Mr. Ewing is guilty of raping my daughter,' and did she say, 'I do believe it'? Answer: Yes, she did.

I am unaware of any rule, old or new, which permits receipt in evidence of a witness's opinion as to the guilt or innocence of the accused. I have always understood that question to be exclusively for the jury and that any invasion of their right to determine the question solely on the facts was improper, whether coming from the judge or from a witness. The statement attributed to Miss Chamberlin could have been treated by the jury only as substantive evidence of her belief of defendant's guilt, and considered in that light I think there can be no doubt of its inadmissibility. However far some recent cases may have gone in allowing such evidence for purposes of contradiction, it is clear that that was not its purpose here, nor do I think the court could have found a phrase to limit its use to that purpose. For as Mr. Justice Cardozo said in *Shepard* v. *U. S.* 290 U. S. 96, 104:

'Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds.'

I am therefore unwilling to accept, as a rule for the future, either the conclusion of the majority in this respect or the reasoning on which it is sustained".

We submit that the opinion of the Chief Justice correctly states the law. He agreed in the result because there was no objection and exception in the court below. However that did not prevent the court from considering it. See *Glasser* v. *United States,* 315 U. S. 60. In the Glasser case the objectionable matter was not raised in the trial court—not even on the motion for new trial. It was not even mentioned in the grounds stated in the notice of appeal. It was raised weeks later in the brief filed in the circuit court of appeals. But it was considered by this Court.

There is authority in abundance as to the right to go beyond the scope of the direct examination. There is also ample authority as to the error arising when a witness is contradicted on a collateral matter. However it is necessary to narrow our search. We find in Greenleaf on Evidence, 16th Edition, Section 461f this:

> "A limitation here obtains which is practically identical with that enforced in the preceding topic, viz., that the proof of inconsistent (or self contradictory) statements cannot be made through other witnesses upon matters 'collateral' to the issue. The reasons of convenience requiring this rule are the same as those explained in the preceding section. The term 'collateral' is here of little service in testing a given offer of evidence; and a more careful and useful definition of it (as already explained in the preceding section) is, Could the fact, as to which the inconsistency is predicated, have been shown in evidence by other witnesses, independently of the inconsistency" citing *Attorney General* v. *Hitchcock,* 1 Exch. 99.

It will be seen therefore that the collateral rule applies as to collateral statements in the same manner as to collateral offenses.

Then to carry the search further we look to the decisions as to the propriety of admitting in evidence the opinion of a witness as to the guilt or innocence of the accused. The overwhelming weight of authority is to the effect that such evidence is not admissible. There is only one decision in the Federal courts on this matter. And that one decision is in the United States Court of Appeals for the District of Columbia—*Yeager* v. *United States,* 16 Appeals D. C. 356. The court in the *Ewing* case therefore overruled the *Yeager* case without so stating. And it seems strange indeed that in the original opinion not a word was said as to the *Yeager* case. Not once was it referred to. When the attention of the court was called to that fact in the petition

for rehearing (R. 125, 126) the opinion was amended to show *Yeager* v. *Yeager*, 16 Appeals D. C. 356 (at page 13). When the attention of the court was called to the fact that that was not the correct citation then the opinion was again amended to show *Yeager* v. *United States*, 16 Appeals D. C. 356.

In the *Yeager* case there was a prosecution for carnal knowledge and the father of the prosecutrix testified that in a conversation with the defendant concerning his daughter's condition he explained to defendant that she had missed her monthly period and defendant advised him to see a physician and not to pay any attention to women in the neighborhood. The witness denied having said to a third person that he thought it strange if defendent was guilty that he should have advised witness to obtain a physician. Objection was made by the government when the defense sought to show by the testimony of such third person that witness had made such a statement. The court of appeals said in the *Yeager* case:

> "There was no error in sustaining the objection. The defendant had the benefit of the witness's statement of the conversation between them. Witness's opinion founded thereon, as to the guilt or innocence of the defendant, was not a fact for the consideration of the jury and hence could afford no foundation for his impeachment."

We submit that the *Yeager* case is decisive here.

For state cases bearing on this matter the following are cited:

People v. *Stackhouse*, 49 Mich. 76; 13 N. W. 364;
State v. *Hazzard*, 75 Wash. 5; 134 Pac. 514;
State v. *Davidson*, 9 S. D. 564; 70 N. W. 879;
Commonwealth v. *Mooney*, 110 Mass. 99;
Elizondo v. *State*, 130 Texas Cr. 393; 94 S. W. (2d) 457;

Shannon v. *State,* 118 Tex. Cr. 505; 38 S. W. (2d) 785;
Drake v. *State,* 29 Tex. (Ct. of Appeals) 269;
State v. *Nave,* 283 Mo. 35; 222 S. W. 744;
Tucker v. *Graves,* 17 Ala. App. 602; 88 Sou. 40;
Spurlin v. *State,* 189 Indiana 273; 124 N. E. 753;
Denton v. *Comm.,* 188 Ky. 30; 221 S. W. 202;
In re Eno's Will, 187 N. Y. S. 756; 196 App. Div. 131;
Norman v. *Shipowners Stevedore Co.,* 59 Wash. 244; 109 Pac. 1012;
Ryerson v. *Inhabitants of Abington,* 102 Mass. 526;
People v. *Foglesong,* 116 Mich. 556; 74 N. W. 730;
Jenkins v. *State,* 45 Tex. Cr. 173; 75 S. W. 312.

In *People* v. *Stackhouse,* 49 Mich. 76, 77; 13 N. W. 364, 365, the court said:

> "The opinion or suspicions of the witness out of court, although inconsistent with the conclusion which the facts she testified to on the trial would warrant, cannot be made the basis of an impeachment. This is so firmly settled by the authorities that the question cannot be considered an open one".

In *State* v. *Hazzard,* 75 Wash. 5; 134 Pac. 514, 519 the court said:

> "* * * In such a case the rule is that previous statements made by the witness as to a matter of opinion or a conclusion cannot be shown although they may tend to contradict inferences which might be drawn from the recital of the facts as given in the testimony of the witness during the examination in chief."

In *People* v. *Foglesong,* 116 Mich. 556; 74 N. W. 730 the court held:

> that evidence that a witness had expressed an opinion that his brother and a certain woman were guilty of improper conduct is not admissible to impeach his

testimony that he had never seen anything improper in their relations.

In *Norman* v. *Shipowners' Stevedore Co.*, 59 Wash. 244; 109 Pac. 1012; the court held

> that where in an action for injuries to a servant, defendant's witness was on cross-examination asked a question calling for a conclusion as to the cause of the accident, and answered without objection being made and on redirect examination defendant asked the witness if he had not stated a different conclusion or opinion to defendant and C, which statement was denied, the defendant could not then call C and question him as to a statement by the witness of a different conclusion from that expressed on the stand, as such statements of opinion were clearly incompetent and did not come within the rule of showing contradictory statements made out of court.

In *Commonwealth* v. *Mooney,* 110 Mass. 99, 101 the court said:

> "The witness * * * having testified to certain facts tending to prove the guilt of the defendant it was not competent for the defendant to show what opinion the witness may have had or expressed upon the merits of the case. The fact that he had an opinion that the defendant was innocent would not tend to contradict or impeach him. At most, it only shows the weight he gave to the facts testified to by him as tending to prove the defendant's guilt, which is for the jury exclusively, and upon which the opinion of witnesses is not competent".

In *Tucker* v. *Graves,* 17 Alabama App. 602; 88 Sou. 40, 41 the court said:

> "In an action against a druggist for selling poison unlabeled in place of a harmless remedy, a physician, testifying in behalf of plaintiff, cannot be impeached by

> evidence as to his statements concerning treatment, etc."

In *State* v. *Nave*, 283 Mo. 35; 222 S. W. 744 the court held:

> that to impeach a witness by prior contradictory statements they must be statements of fact pertinent to the issue, and not merely matters of opinion; facts which would be competent evidence independent of inconsistency with the witness' testimony· hence it was error to admit impeaching evidence that accused's father had previously stated in conversation in accused's absence, that he thought accused had taken the mules he was accused of stealing.

In *Jenkins* v. *State*, 45 Tex. Cr. 173; 75 S. W. 312 the court held:

> that a witness in a criminal prosecution cannot be impeached as to his statements of his belief as to who committed the crime, though his belief may have been founded on statements of fact of another witness, as to which she is impeachable.

We say that the conclusion to be drawn from all these cases is that it is never permissible to receive in evidence the opinion of a witness as to the guilt or innocence of the accused. That is a function exclusively for the jury. And without doubt it applies with greater force in this case in that the witness in question (Miss Chamberlin) denied that she had expressed an opinion as to the guilt of petitioner. And it must not be overlooked that the record shows (89-91) that in such conversation the opinion was not stated. If such a rule of evidence is approved for the Federal courts then by the means of false testimony the prosecuting officials could bolster an otherwise weak case by the use of methods here employed. And in saying this we are not stating that the prosecuting officials in the *Ewing* case knew

that the testimony of the mother of the prosecutrix was false but we have the proposition that Miss Chamberlin herself denied expressing such an opinion and her version is corroborated by the record at pages (89-91). To sustain such a method of procedure carries with it the danger of consequences of the gravest nature.

It is urged that the matter being one of such importance and contravening the accepted rules of evidence that this Court should decide the matter so that Federal courts can be guided accordingly. As has already been pointed out there is only one Federal decision that is controlling and that case sustains the contention of petitioner. *Yeager* v. *United States,* 16 Appeals D. C. 356.

In the rules of this Court we find in Rule 38 (5) that the character of reasons for granting certiorari are indicated. In Rule 38 (5)b we find this:

> "Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions. * * *"
>
> "Where a circuit court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

II.

A Witness Cannot Be Contradicted on a Collateral Matter.

Petitioner says that the matter under this heading has already been treated under the first point and will not be repeated here.

III.

When Is Error Prejudicial in a Criminal Trial?

A witness was called on behalf of the defendant and was questioned within certain limits by the petitioner. The

district attorney then went beyond the limits of cross-examination and asked this question (R. 115):

> Q. On the 25th day of October, Saturday the 25th day of October, Saturday before this particular occurrence that he is being tried for here, didn't the defendant say to you, "Let's get some whiskey and go to the Whitestone and get some of the girls and have a party tonight?"
> A. No, sir.
> Q. He didn't say anything like that?
> A. No, sir.

There was no justification for such a question and its only effect could have been to label petitioner as a man of immoral traits. While we are not unmindful that some of the recent cases have overturned some of the earlier decisions and hold that it is incumbent upon the complaining party to show that the error was in fact injurious yet we say that nothing is more satisfactory from a prosecutor's standpoint when trying an accused for grand larceny than to show that at some other time he expressed a desire to steal. The case of *Deery* v. *Cray*, 5 Wall. 795 still is logical and sound. In that case this court said:

> "We concede that it is a sound principle that no judgment should be reversed in a Court of Error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights".

In *Williams* v. *United States*, 158 Federal 30 the court said:

> "It is a rule of law in this jurisdiction, often repeated, that, when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, 'unless it appears beyond doubt that

the error did not and could not prejudice the rights of the party' ".

In *Miller* v. *Territory of Oklahoma,* 149 Federal 330, the court said:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to said suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury helped to make up the weight of the prosecution which resulted in the verdict of guilty".

In *People* v. *Robinson,* 273 N. Y. 438; 8 N. W. (2nd) 25, the court said:

> "Judges trained by years of experience to base decisions solely upon the competent evidence contained in the record are not always completely confident of their ability to disregard and remain uninfluenced by information, or even impression, conveyed to them dehors the record".

And in this same connection and giving support to our allegation of misconduct on the part of the prosecuting officers, attention is called to page 39 of the record when in the questioning of prospective jurors there is injected in the case a statement that a supposed witness had been indicted for mailing obscene literature through the mail.

There was no basis whatever for the question and it could only have been done to create an atmosphere of hostility toward the petitioner.

The Failure to Make Objections and Take Exceptions in the Trial Court Should Not Affect This Petition.

Before concluding it is well to point out that the Chief Justice in the court below held that the opinion testimony was improper but said this in his concurring opinion.

> "My concurrence in the result is because the record in this case shows that the testimony to which I have referred was given without objection or exception".

It is of course most unfortunate that no objections were made or exceptions taken. However the trial judge did not consider this an obstacle when he said in his memorandum opinion:

> "It is deemed proper by the court that all matters complained of as erroneous and prejudicial should be considered without respect to whether or not any objection had been made upon which to predicate such complaint U. S. C. A. Title 28, Section 391. This has been done, not only with respect to those matters discussed in this memorandum, but also all others which were mentioned in the motion, supplements and amendments thereto, affidavits, testimony and argument". (Record 31 and 32).

It seems rather strange therefore that the trial judge did not penalize the petitioner because proper objection was not made and exception taken yet the appellate court did. See *Van Gorder* v. *United States,* 21 F. (2nd) 939 and *United States* v. *Dressler,* 112 F. (2d) 972.

* * * * * * *

It will be seen that the Chief Justice said that opinion testimony was not admissible but he joined in the affirmance since there was no objection and exception and that the at-

torney perhaps felt that it was admissible. In this connection attention is invited to page 126 of the record wherein the only skilled practitioner in the criminal trial swears that it was improper.

Conclusion.

It is contended that the interests of justice will be served and the fairness of criminal trials will be safeguarded if the important question raised in this case is settled by this Court. Otherwise if the rule of evidence sanctioned by the court below and representing such a departure from the accepted and usual course of judicial proceedings is permitted to stand only confusion can result. The rule of evidence announced in this case will serve as a guide throughout the country and it will only be a brief period of time until this court will be required to settle the matter. We submit that this case is the appropriate means to accomplish this.

Wherefore it is respectfully submitted that the writ of certiorari should issue as prayed.

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